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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether the action should be dismissed because the district court lacked jurisdiction over the constitutional issues.

2. Whether appellee's rights to equal protection of the law have been violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations.

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IN THE

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No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
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TAXATION WITH REPRESENTATION OF WASHINGTON,
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AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT

INTEREST OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES

The Veterans of Foreign Wars of the United States ("VFW") is a federally-chartered veterans' organization.[1] Act of May 28, 1936, ch. 471, § 1, Pub. L. No. 74-630, 49 Stat. 1390. With 1.9 million members, the VFW is one of the largest veterans' organizations in the United States. The VFW engages in a broad range of activities

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[1] In accordance with Sup. Ct. R. 28.1, the VFW, a corporation, states that it has no parent companies, subsidiaries, or affiliates. There are, however, over 10,000 state departments, county councils, districts, and posts throughout the United States. These local units have been established pursuant to 36 U.S.C. § 114, and each includes the words "Veterans of Foreign Wars" in its name. In addition, the VFW has formed a political action committee, known as "VFW-PAC."

on behalf of veterans, including lobbying. The VFW is funded, in part, by tax-deductible contributions.

If the decision of the Court of Appeals is upheld, the interests of the VFW could be directly and adversely affected. The court found that appellee's rights to equal protection of the law were violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations such as the VFW. The court remanded the case for a determination of whether the constitutional infirmity should be cured by eliminating the lobbying limitation altogether or by extending that limitation to veterans' organizations. The court recognized that veterans' organizations "would be directly affected" by extension of the lobbying limitation[2] and therefore directed that veterans' organizations be invited to participate on remand in the fashioning of a remedy, although still having no voice whatever in the critical constitutional determination. J.S. App. at 77a.

In a decision of this Court, just as on remand, the status of the VFW under a complex statutory scheme could be altered, perhaps in unintended ways, and the rights accorded to it by the Congress could be abridged. The VFW therefore has a direct and substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

Appellee commenced this action under Section 7428 of the Internal Revenue Code,[3] which provides a limited

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[2] Jurisdictional Statement Appendix at 76a, Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) (hereinafter cited as J.S. App.). The Jurisdictional Statement is hereinafter cited as J.S.

[3] All references to Sections and Regulations herein are to sections of the Internal Revenue Code of 1954, and to the Treasury Regulations promulgated thereunder, as amended to the date of this brief, unless otherwise indicated. 26 U.S.C. § 1, *et seq.* (1976 and Supp. V, 1982); 26 C.F.R. § 1.0, *et seq.* (1982).

exception to the broad Congressional policy barring declaratory and injunctive actions with respect to matters arising under the internal revenue laws. Section 7428, however, authorizes a court only to make a declaration with respect to whether an organization is "described in section 501(c)(3)." Under this narrow grant of authority, a court is not empowered to consider the constitutionality of Section 501(c)(3) itself. This conclusion is consistent with the Congressional intent. Section 7428 was adopted specifically to constrain administrative discretion by providing expedited judicial review of "determinations" by the Commissioner. Because the Commissioner is without power to make a determination with respect to the validity of a tax statute, it is clear that Congress did not intend, by enacting Section 7428, to provide jurisdiction to hear constitutional claims such as those made by appellee. The Court must take cognizance of such a jurisdictional defect, even at this late stage in the proceeding, and reverse the decision of the Court of Appeals.

Apart from the problem of jurisdiction, the opinion of the Court of Appeals utterly fails to reflect the complexity and the deliberateness of the statutory scheme at issue. The specific provision that appellee has challenged is but one of a number of different rules developed by the Congress over many decades affecting the lobbying activities of exempt organizations. The provisions affecting lobbying by charitable organizations, which have undergone several extensive revisions, were enacted in response to well-documented Congressional concern with the use of such organizations to provide tax deductions for lobbying designed to advance the personal interests of contributors. The potential for abuse that Congress identified in the case of charitable organizations is simply lacking in the case of veterans' organizations such as the VFW, whose structure ensures that legislative positions conform to institutional objectives and to the views of a large and diverse membership. Congress has always been well aware of the nature and extent of lobbying

on behalf of veterans, since most of the VFW's legislative appearances are at the invitation of congressional committees. Congress in fact relies upon the major veterans' organizations to assist it in fulfilling its obligations with respect to the nation's veterans. If some restriction on veterans' lobbying were necessary, the legislative opportunity was specifically presented in 1972, when the tax code provisions dealing with the exempt status of veterans' groups were revised. The failure of Congress to impose a limit on the lobbying of veterans' groups, as well as its decision to impose several finely drawn limits on lobbying by charitable organizations, involves precisely the kind of legislative deliberation that will survive an equal protection challenge under any level of scrutiny.

ARGUMENT

I. APPELLEE'S CONSTITUTIONAL CLAIMS EXCEED THE LIMITED STATUTORY GRANT OF JURISDICTION IN A CASE BROUGHT UNDER SECTION 7428

Appellee sought from the Internal Revenue Service a determination that it qualifies for exempt status under Section 501(c)(3) of the Internal Revenue Code. Appellee admitted that it intends to lobby substantially, in plain contravention of the statute, and thus acknowledged that it could not qualify for tax exemption under Section 501(c)(3) unless the lobbying limitation contained in the statute was found to be unconstitutional. The Commissioner correctly determined, in accordance with the scope of his authority, that appellee did not qualify for exempt status under the present Section 501(c)(3). Appellee then commenced this declaratory action in federal district court under Section 7428.[4] Section 7428, however, empowers a court in a case such as this only to declare whether the organization before

[4] Jurisdiction of the district court over actions brought under Section 7428 rests on 28 U.S.C. § 1346(e).

it qualifies "as an organization described in section 501 (c) (3)". A court whose jurisdiction is derived from Section 7428 is, like the Commissioner, without power to consider or to pronounce upon the constitutionality of Section 501(c) (3). Because the decision of the Court of Appeals ventured far beyond the limits of the court's jurisdiction, it must be reversed.

Section 7428 is a narrowly circumscribed exception to the longstanding Congressional policy barring judicial consideration of declaratory and injunctive actions with respect to matters arising under the internal revenue laws. *See* the Anti-Injunction Act, Section 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201; *National Alliance v. U.S.*, 81-1 U.S. Tax Cas. (CCH) ¶ 9464, n.3 (D.D.C. 1981). These rules are vital to the federal revenue system, and assure the Government "of prompt collection of its lawful revenue." *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962). In view of this broad, overriding policy, exceptions to the Anti-Injunction Act and the Declaratory Judgment Act, including Section 7428, should be narrowly construed, as courts in fact have done. *See, e.g., Urantia Foundation v. Commissioner*, 684 F.2d 521 (7th Cir. 1982); *CREATE, Etc., Inc. v. Commissioner*, 634 F.2d 803 (5th Cir. 1981); *AHW Corp. v. Commissioner*, 79 T.C. 390 (1982); *New Community Sr. Citizen Housing v. Commissioner*, 72 T.C. 372 (1979). Thus, unless appellee's claims fall squarely within the exception created by Section 7428, they are outside the subject matter jurisdiction of the district court. *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974).[5]

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[5] The narrow exception to Section 7421(a) and 28 U.S.C. § 2201 set forth in *Enochs v. Williams Packing & Navigation Co., Inc.*, is inapplicable to the present case because it is not clear that under no circumstances would the Government ultimately prevail. *Alexander v. "Americans United" Inc.*

Section 7428 provides, in pertinent part:

> (a) Creation of Remedy.—In a case of actual controversy involving—
>
> (1) a determination by the Secretary—
>
> (A) with respect to the initial qualification . . . of an organization as an organization described in section 501(c)(3) . . .
>
> * * * *
>
> upon the filing of an appropriate pleading, [the court] may make a declaration with respect to such initial qualification . . . .

In enacting Section 7428, Congress has done no more than to authorize a court to decide whether a specific set of words and phrases—Section 501(c)(3)—in its present form describes the organization before it. The jurisdictional mandate does not extend to examining the validity of Section 501(c)(3) itself.[6] Since appellee has not sought a declaration with respect to its qualification as an organization "described" by existing Section 501(c)(3), but instead seeks a declaration that a statutory scheme is unconstitutional, appellee's claim is outside the scope of Section 7428.[7]

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[6] This Court has already recognized the distinction between determining whether an organization is described by Section 501(c)(3) and deciding whether Section 501(c)(3) itself is constitutional. In Alexander v. "Americans United" Inc., 416 U.S. 752 (1974), the court below found invalid the lobbying provision of Section 501(c)(3) here at issue. This Court summarized the action of the lower court as follows: "As the court noted, the thrust of respondent's argument is not that it qualifies for a § 501(c)(3) exemption under existing law but rather that that provision's 'substantial part' test and proscription against efforts to influence legislation are unconstitutional." 416 U.S. at 759.

[7] This interpretation is easily reconciled with Section 7428 cases that have considered the constitutionality of the Commissioner's administration of the tax laws. Authority to "prescribe all needful rules and regulations for the enforcement of" the internal revenue laws is delegated to the Commissioner pursuant to Section 7805(a). Questions concerning the correctness of such rules and regulations, including constitutional questions, are thus necessarily

This conclusion is reinforced by the applicable legislative history and the prerequisites for commencing an action under Section 7428. The focus throughout the legislative history and in the procedure established for bringing a Section 7428 action is on providing prompt and effective judicial review of a determination by the Commissioner with respect to, *inter alia*, whether an organization is described by Section 501(c)(3). The Commissioner is without power, however, to determine the constitutionality of a tax statute. As this Court acknowledged in *Johnson v. Robison*, 415 U.S. 361, 368 (1974), "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies [citations omitted]," quoting *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result). *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (constitutionality of a statutory requirement was "a matter beyond [the Secretary's] jurisdiction to determine"); *Moore v. City of East Cleveland*, 431 U.S. 494, 525 (1977) (Burger, C.J., dissenting); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 773 (1974) (Blackmun, J., dissenting); 3 K. Davis, Administrative Law Treatise § 20.04 (1958 and Supp. 1982 § 20.14).[8]

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within the authority of the Commissioner, and therefore are within the ambit of Section 7428 "determinations." *See, e.g.*, Big Mama Rag, Inc. v. U.S., 631 F.2d 1030 (D.C. 1980); Prince Edward School Foundation v. Commissioner, 478 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam*, (D.C. Cir. unpub'd order, 1981), *cert. denied*, 450 U.S. 944 (1981); Price Genealogical Ass'n v. IRS, 79-1 U.S. Tax Cas. (CCH) ¶ 9361 (D.D.C. 1979). Until the present case, the constitutionality of a tax statute had not been considered in a case arising under Section 7428.

[8] The Internal Revenue Service apparently shares this view. "In rejecting TWR's 1975 refund claim, the Service stated that the claim was based on the taxpayer's view that the statute was unconstitutional and observed that '[o]nly the courts have authority to pass on such matters.'" Taxation With Representation v. United States, 585 F.2d 1219, 1223 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Because the Commissioner is without power to make a determination with respect to the constitutionality of a tax statute, and because Section 7428 was intended to provide judicial review of determinations made by the Commissioner, the constitutionality of a tax statute may not properly be brought before a court in a Section 7428 case.

This reading of Section 7428 is buttressed by the Court's analysis of a closely related question of statutory interpretation in *Johnson v. Robison*, 415 U.S. 361 (1974). There, the issue was whether a statute that precluded judicial review of a "decision of the Administrator" prevented review of the validity of the statute. The Court noted the inherent lack of power of an administrative agency to determine the validity of federal statutes, and therefore held that the statutory bar to review of a "decision of the Administrator" did not encompass a "decision of *Congress* to create a statutory class entitled to benefits . . . ." 415 U.S. at 367 (emphasis original). Applying *Johnson v. Robison* to the case now before the Court, it is clear that since Section 7428 only provides review of a "determination by the Secretary" as to whether an organization is described by Section 501(c)(3), it does not provide review of the "decision of Congress" defining the class eligible for Section 501 (c)(3) benefits.

The legislative history of Section 7428 demonstrates that Congress intended only to provide judicial review of matters within the Commissioner's discretion. Section 7428 was adopted in 1976 in response to urging by this Court that Congress provide a mechanism for meaningful judicial review of the Commissioner's broad discretionary powers over not-for-profit organizations. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), the Court held that the Internal Revenue Service could not be restrained through a declaratory judgment proceeding

from withdrawing administrative recognition of tax-exempt status. Tax-exempt organizations and their donors were therefore relegated to an action to redetermine a tax deficiency or an action to determine eligibility for a tax refund in order to establish qualification for tax exemption. The Court expressed its dissatisfaction with this result and recommended legislative revision:

> . . . * * * The degree of bureaucratic control that, practically speaking, has been placed in the Service over those in petitioner's position is susceptible to abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities. Specific treatment of not-for-profit organizations to allow them to seek preenforcement review may well merit consideration. But this matter is for Congress . . . .

Bob Jones University, 416 U.S. at 749-750.[9] Thus, the Court perceived the problem as one requiring procedural relief from arbitrary determinations of the Internal Revenue Service, and not as one requiring the expansion of remedies to provide plenary review of the validity of the statute itself.

Both the Senate and House reports on the legislation that became Section 7428 specifically refer to the Court's expression of concern in these cases about the potential abuses of administrative discretion in the exempt organization area.[10] It is apparent in these reports that

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[9] The only dissenting justice in the two cases expressed similar views. Alexander v. "Americans United" Inc., 416 U.S. at 774-775 (Blackmun, J., dissenting).

[10] H. Rep. No. 658, 94th Cong., 1st Sess. 284 (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3180; S. Rep. No. 938, 94th Cong., 2d Sess. 586 (1976) *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4010 (hereinafter cited as S. Rep. No. 938). The precise issue before the Court in both cases involved the administrative revocation of previously-granted tax-exempt status, but it is clear that Congress regarded the admonitions of the Court and the impact of its decisions as applying with equal force to the initial request for tax-exempt status. S. Rep. No. 938 at 586-587.

the intent of the Congress was only to mitigate the force of the Commissioner's administrative power by allowing expedited review of his administrative determinations.[11] Thus, Congress provided jurisdiction only for declarations with respect to "determinations" of the Commissioner, and rejected the type of expansive jurisdiction found, for example, in the Declaratory Judgment Act, 28 U.S.C. § 2201.[12]

The courts have recognized that Congress' purpose in enacting Section 7428 was "to provide nonprofit organizations claiming tax-exempt or non-private foundation status with an avenue for prompt judicial relief from erroneous or arbitrary determinations by the Internal Revenue Service." *Friends of the Society of Servants of God v. Commissioner*, 75 T.C. 209, 215 (1980). "[T]he focus of [Section 7428] is on the review of the Service's administrative determination . . . . The action is called a declaratory judgment, but it has much narrower scope than exists in respect of declaratory judgment litigation in the United States District Courts generally". *Houston Lawyer Referral Service Inc. v. Commissioner*, 69 T.C. 570, 573 (1978).

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[11] The Senate report, for example, notes that a declaratory judgment procedure is needed "[i]n order to provide an effective appeal from an Internal Revenue Service determination that an organization is not exempt from tax. . . ." S. Rep. No. 938 at 587.

[12] During legislative consideration of this issue, at least one witness argued that a declaratory judgment provision for exempt organizations should permit resolution of the validity of statutory provisions. See *Proposals for Administrative Changes in Internal Revenue Service Procedures, Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 94th Cong., 1st Sess. (1975) at 124-125 (testimony of Alan Morrison). The constitutionality of a statute was in fact at issue in the *"Americans United"* case, where the Court found that jurisdiction was lacking. Although Congress did consider the issue of administrative discretion presented by *"Americans United,"* there is no indication in the legislative history that Congress intended to provide review of the specific subject matter of that case, and far broader language would have been required in the statute to do so.

The concern of Congress with the administrative determination is reflected in the requirement of Section 7428 (b)(2) that organizations seeking relief under Section 7428 must first exhaust all administrative remedies. "To exhaust its administrative remedies, the organization must satisfy all appropriate procedural requirements of the Service", such as supplying "the necessary information on which to make a determination." S. Rep. No. 938 at 590. "[T]he purpose of the exhaustion of administrative remedies requirement was to provide the Court with a full and complete administrative record on which to base its decision." *Gladstone Foundation v. Commissioner*, 77 T.C. 221, 232-233 (1981). "Absent such a requirement, an organization might be tempted to avoid pressing its request for a determination as to its status, on the assumption that it will receive more favorable treatment in court." Tax Section Recommendation No. 1974-17, 28 Tax Law. 431, 435 (1975).[13] The Tax Court has in fact fashioned its rules for proceedings under Section 7428 in order to make meaningful the exhaustion of administrative remedies requirement.[14] Thus, for example, although the standard of review under Section 7428 is *de novo*, its scope is limited to the administrative record. *Southwest Virginia Professional Standards Review Organization, Inc. v. United States.*

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[13] By contrast, exhaustion of administrative remedies is *not* a jurisdictional prerequisite to obtain judicial review pursuant to a tax deficiency or tax refund action. *See, e.g.*, M. Garbis and R. Frome, Procedures in Federal Tax Controversies 3.2, 10.2 (1968). Judicial review of a typical tax case results in almost complete substitution of judgment on all questions. 4 K. Davis, Administrative Law Treatise § 29.01, p. 114 n.1 (1958 and Supp. 1982).

[14] At the urging of Congress, S. Rep. No. 938 at 588, the Tax Court rules for Section 7428 cases have been adopted by the other courts with jurisdiction over such cases. Southwest Virginia Professional Standards Review Organization, Inc. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9747 (D.D.C. 1978); Animal Protection Institute, Inc. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9709 (Ct. Cl. 1978).

"To decide otherwise would enable plaintiffs to circumvent the Section 7428(b)(2) requirement that applicants exhaust their administrative remedies. [footnote omitted]." *Id.* at 85,519.[15]

The limited scope of judicial review under Section 7428, which was not raised at any earlier point in this litigation, thus follows from a straightforward analysis of the statute and its legislative history. This limitation on the grant of jurisdiction as reflected in the statute and in court rules implementing the statute has very practical consequences. Because the Commissioner is bound by the governing statutes, and therefore cannot make the necessary record with respect to constitutional issues, and because the trial-level court is precluded from considering legal issues and facts that the Commissioner himself could not consider in the administrative proceeding, Section 7428 is unsuited to the task of coping with constitutional challenges to tax statutes. The problems that would inevitably follow from misuse of Section 7428 are vividly illustrated by the case now before the Court.

In the administrative proceeding, the Commissioner properly made no attempt to establish a record to refute the constitutional challenges made by appellee. Indeed, the Tax Court rules, which apply to all Section 7428

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[15] Under Tax Court Rule 217(a), judicial review is "ordinarily" limited to the administrative record unless good cause is shown, or a revocation is involved. The Advisory Committee Note to Rule 217(a) states that the possibility of going outside the administrative record appears "merely out of an abundance of caution" and that "there does not appear to be at this time any circumstances under which a trial will be held except as to disputed jurisdictional facts or to resolve disagreement between the parties as to the contents of the administrative record." 68 T.C. 1025, 1048 (1977). The exception for revocations is premised on the fact that normally in such cases, the administrative record is independently established by the Internal Revenue Service, rather than by accepting facts asserted by the applicant.

cases,[16] do not contemplate the submission of evidence by the Commissioner, Tax Ct. R. 210(b)(11) (scope of administrative record), and generally require the Commissioner to accept the facts pleaded by the petitioner without investigating them, Tax Ct. R. 213; Advisory Comm. Note to Rule 213, 68 T.C. 1025, 1042 (1977). A defense of the constitutionality of the challenged provisions therefore did not commence until the judicial stages of this proceeding. "Evidence" supporting the preferential treatment of veterans' organizations among tax-exempt entities was furnished by appellant's briefs and adduced by extensive judicial fact finding. Contrary "evidence" was introduced by appellee's briefs. The result is that this Court has been presented with a wholly inadequate record on which to decide whether the challenged statutory provisions violate appellee's rights to equal protection of the law. Inadequacy of the record for purposes of constitutional determinations is inherent in the procedures adopted for cases brought under Section 7428.

The jurisdictional defect in appellee's claims cannot be cured in this case or waived by an appellate court. "[F]ederal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them." 1 J. Moore, *Moore's Federal Practice* ¶0.60[3] (2d ed. 1982). The absence of subject matter jurisdiction is not waivable by the parties, and may be raised by courts, including this Court, on their own motion. The cause must be ordered dismissed upon a finding that the court lacks jurisdiction. *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville Ry. v. Mottley*, 211 U.S. 149 (1908); *see also* Fed. R. Civ. P. 12(h)(3).

California v. Grace Brethren Church, 457 U.S. ——, 102 S. Ct. 2498 (1982), demonstrates the consequences of a finding that the Court lacks jurisdiction. There,

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[16] *See* note 14, *supra*.

despite the federal defendants' request that the Court resolve the constitutional question, the Court declined to hear First Amendment claims after determining that the district court lacked jurisdiction by reason of the Tax Injunction Act, 28 U.S.C. § 1341. Similarly, in *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), the Court refused to hear constitutional challenges to Section 501(c)(3) in an action that the Court found was outside the subject matter jurisdiction of the district court by reason of the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Anti-Injunction Act, Section 7421(a). Accordingly, the Court should now decline to hear appellee's constitutional claims because Section 7428, as applied to such claims, does not override the general bar to declaratory actions in federal tax matters imposed by the Anti-Injunction Act and the Declaratory Judgment Act.

Finally, it should be noted that if the Court decides that the constitutional claims here at issue fall outside the scope of Section 7428, organizations such as appellee are not without a remedy. The tax deficiency and tax refund routes are still available to test those claims. *See, e.g., Taxation With Representation v. United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979), in which the same constitutional challenges that found favor before the Court of Appeals in this litigation were decided adversely to appellee's predecessor in interest in a tax refund action.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTORY SCHEME AT ISSUE VIOLATES THE EQUAL PROTECTION CLAUSE

The Court of Appeals found that appellee's rights to equal protection were violated by the provisions of the Internal Revenue Code that impose upon the lobbying of organizations exempt from tax under Section 501(c)(3) a limitation that is not imposed on the lobbying of veterans' groups. In so holding, the court looked to the

lobbying limitation in Section 501(c)(3) as if it were simply an additional restriction imposed without adequate reason upon one among several otherwise comparable statutory classes. The history of the lobbying provisions demonstrates, however, that a number of statutory distinctions, of which appellee has challenged but one, were deliberately drawn over many decades in response to specific Congressional concerns with lobbying by charitable organizations. This statutory scheme, involving deliberate distinctions finely drawn among organizations that are dissimilar in critical respects, will survive an equal protection challenge under any level of scrutiny.[17]

The concerns with lobbying by exempt entities that the Congress identified have no application to veterans' organizations such as the VFW. In looking to the lobbying of charitable organizations, Congress saw a broad range of purposes and activities, an absence of accountability, and a potential for significant abuse. By contrast, major veterans' organizations, which are Congressionally chartered and which submit annual reports on their finances and procedures to Congress, pursue legislative objectives that are consistent with their charter mandates and that are adopted by vote of a broad-based membership. Such organizations carry out a responsibility to the nation and to its veterans of providing Congress with the information and advice necessary to oversee and maintain a variety of veterans' programs. For veterans' groups, informing the legislature is a function that Congress has sanctioned and that it encourages by frequent requests for testimony and assistance.

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[17] The VFW endorses the position set out in appellant's Jurisdictional Statement that the standard of review to be applied in determining the constitutionality of the distinctions at issue is whether such distinctions are rationally related to the achievement of a legitimate governmental purpose. The history of Congressional deliberation and action in this area is such, however, that the statutory distinctions could also withstand a higher level of scrutiny.

The Court of Appeals' decision must be viewed in the proper legislative context. Section 501(c) confers tax-exempt status on twenty-two separate classes of organizations. In addition to charitable organizations and veterans' groups, exempt status is accorded to entities such as business leagues, social clubs, cemetery companies, credit unions, black lung trusts, horticultural organizations, and other groups of varied character and constituencies. Of the various classes of exempt organizations, six are qualified recipients of deductible contributions under the provisions of Section 170.[18] The extent to which contributions may actually be deducted for income tax purposes, however, varies among these classes of organizations and in some cases among organizations within a single exempt category, and special rules apply to limit deductions for certain kinds of contributions.[19] In addition, contributions to certain of these organizations are deductible only if the funds are devoted to specific purposes.[20]

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[18] Sections 170(c)(1)-(5) allow deductions for contributions to instrumentalities of the United States exempt under Section 501(c)(1), charitable or educational organizations exempt under Section 501(c)(3), fraternal beneficiary societies exempt under Section 501(c)(8), fraternal societies operating under the lodge system exempt under Section 501(c)(10), cemetery companies exempt under Section 501(c)(13), and veterans' organizations, which can be exempt under Section 501(c)(19), Section 501(c)(4), or Section 501(c)(8). Of the six classes of organizations that qualify for income tax purposes as recipients of deductible contributions, five may receive contributions that are deductible for estate and gift tax purposes. Sections 2055(a)(1)-(4) and 2522(a)(1)-(4). Deductions are not permitted for gifts or bequests to cemetery companies exempt under Section 501(c)(13).

[19] Section 170 and Treasury Regulations § 1.170A.

[20] *See, e.g.*, Section 170(c)(4), which provides that contributions to fraternal societies operating under the lodge system are deductible only if used exclusively for religious, charitable, scientific, literary, or educational purposes. In several cases, for estate tax and gift tax purposes, deductibility is limited to amounts that are

A number of distinctions, including those appellee has addressed, are made with respect to the lobbying activities of exempt organizations. For federal estate tax purposes, bequests to a fraternal beneficiary society exempt from tax under Section 501(c)(8) or Section 501(c)(10) are deductible only if the society "would not be disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation." Section 2055(a)(3).[21] A number of organizations exempt under Section 501(c) are not expressly prohibited from engaging in lobbying activities, but are indirectly denied the right to use funds for legislative purposes.[22] Labor and agricultural organizations exempt under Section 501(c)(5) and trade associations and chambers of commerce exempt under Section 501(c)(6) can fund certain of their legislative activities with dues or contributions that are deductible to members under Section 162(e), but deduc-

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used to fund specified activities. For example, under Section 2522(a)(3), a gift tax deduction is allowed for gifts to fraternal societies operating under the lodge system only if such gifts are to be used exclusively for religious, charitable, scientific, literary or educational purposes, defined specifically as "including the encouragement of art".

[21] A provision designed to add a lobbying restriction comparable to that found in Section 501(c)(3) to the income tax exemption and deduction provisions relating to fraternal beneficiary societies passed the House in 1948, but was never enacted. H.R. 6712, 80th Cong. 2d Sess. § 113(b)(2) (1948).

[22] *See, e.g.*, Section 501(c)(17)(A)(i) (which prohibits the income or corpus of a supplemental unemployment benefit trust to be used for any purpose other than for providing supplemental unemployment compensation benefits); Section 501(c)(18)(A) (which precludes exempt treatment for employee funded pension trusts if the funds contributed are not used solely for the provision of benefits under a pension plan); Section 501(c)(21)(B) (which prohibits funds of a black lung trust to be used for any purposes other than those specified); and Section 501(c)(22)(A) (which sets forth the exclusive purposes for which the sponsors of a multi-employer plan may establish a trust).

tions are denied under Section 162(e)(2)(B) for contributions used to carry on certain kinds of grass roots lobbying. Finally, private foundations, a sub-class of Section 501(c)(3) organizations, are virtually prohibited from engaging in any lobbying whatsoever. Sections 509 and 4945.

The intricacies and the interrelationships of the provisions relating to tax exemption and to deductibility that are set out in Sections 162, 170, 501, 509, 2055, 2522, and 4945 make it very clear that Congress has always regarded different classes of exempt organizations as distinct in their character and functions. Congress has acted repeatedly and deliberately to apply to these various organizations the specific rules and limitations that it has deemed appropriate. The distinctions with respect to lobbying that Congress has created are part of this broader pattern, and reflect the kind of deliberation that is peculiarly the province of the legislature.

From the web of rules affecting exempt organizations, appellee has focused its claim on Section 170, which governs the deductibility of contributions, rather than on Section 501(c), which controls exempt status.[23] Deductibility of contributions has indeed been the heart of the lobbying issue since 1934, when the first limit on lobbying by exempt organizations was enacted.[24] The Senate Report for the Revenue Act of 1934 indicates that Congress regarded the lobbying limitation imposed as a condition to the deductibility of contributions as the crucial statutory revision, and viewed as merely a conforming

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[23] An organization that intends to carry on lobbying as a primary activity can qualify for exempt status under Section 501(c)(4), which provides, with some minor exceptions, virtually all of the benefits of exemption available under Section 501(c)(3). Organizations exempt under Section 501(c)(4), however, do not qualify as recipients of deductible contributions under Section 170.

[24] 48 Stat. 690, 700, 755, 760 (1934).

amendment the addition of a lobbying limitation to the rules governing exempt status.[25]

The 1934 legislation raised several key issues concerning lobbying by exempt organizations that have resurfaced repeatedly. The specific impetus for the 1934 amendment was the ability of a few contributors to use an exempt organization as a vehicle to deduct the costs of lobbying that they would otherwise have funded on a personal nondeductible basis. As Senator Reed stated during floor debate on the amendments, "[t]here is no reason in the world why a contribution . . . should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee was trying to reach . . . ." 78 Cong. Rec. 5861 (1934). Several senators involved in the debate pointed out that the amendment as drawn would affect not only organizations representing narrow or selfish interests, but also "worthy institutions" such as the Society for the Prevention of Cruelty to Children. Senator Reed called attention specifically to "the case of those who are urging the adoption of the child-labor amendment. Certainly they are not acting from selfish motives, and yet almost their entire activity is an effort to influence legislation." *Id.* Certain senators also questioned whether the lobbying limitation should extend to all exempt organizations. Senator Harrison noted that the amendment relating to deductibility of contributions to charitable organizations would not apply to other organizations, such as "war organizations," and suggested that this restriction should be reconsidered by the conferees. *Id.*[26]

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[25] S. Rep. No. 558, 73rd Cong., 2d Sess. 26, 30 (1934).

[26] The Congress would have been well aware in 1934 of the nature and scope of veterans' lobbying activities. The VFW, for example, had been actively involved in the legislative proceedings which led to enactment of the War Risk Insurance Act of 1917, the first vocational training legislation for disabled veterans in 1918, the first

Despite these expressions of concern, the Senate declined to take action either to extend the lobbying limitation to war organizations or to exempt publicly-supported groups. Instead, the Senate agreed to send the provision to conference, where the language could be changed "if it is found to do any inequity". *Id.* at 5959. The conference committee subsequently considered and modified the lobbying provision. *Id.* at 7831. The final version of the amendment, however, remained limited to Section 501 (c) (3) organizations, and failed to distinguish between publicly-supported organizations and those that merely advance the "selfish" motives of their contributors.[27]

The questions raised during the 1934 Senate debate about the "worthy institutions" that were of necessity subjected to the same restrictions as those applied to "selfish" entities reflected a problem in the treatment of charities that was not resolved until 1969. Prior to enactment of the Tax Reform Act of 1969,[28] no substantial statutory distinction was drawn between private foundations and public charities, both of which are exempt from tax under Section 501(c)(3). The same provisions thus governed the deduction of contributions not only to publicly-controlled and publicly-supported organi-

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pension bill for Spanish-American war veterans in 1920, the World War Veterans Act in 1924, and the first bill granting pensions to the widows and children of veterans regardless of service connection in 1934.

[27] Adoption of the amendment in this form, after the Senate had called the attention of the conference committee to the precise scope and effect of the provision, can only be construed as a formal approval and adoption of the statutory lines that the Senate had drawn. The Court of Appeals was plainly in error in suggesting that Congress had acted inadvertently in 1934. Taxation With Representation of Washington v. Regan, 676 F.2d 715, 735, 744 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338).

[28] Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

zations, but also to foundations that were both funded by and controlled by a few individuals. Subject only to the general lobbying limitation enacted in 1934, such individuals could direct the lobbying activities of their foundations on a wide range of issues, including issues of specific concern to themselves or issues on which they held views not widely accepted, and could do so on a tax-subsidized basis.

The problem of foundation lobbying was the subject of very extensive study and Congressional debate over a period of many years. Finally, in 1969, Congress concluded that the legislative restriction enacted in 1934 was not a sufficient restraint upon organizations not subject to the internal controls that follow from public support.[29] The private foundation provisions that were enacted thus contained a new and much stricter lobbying limitation. If an organization can qualify for exemption only as a private foundation,[30] it is subject to excise taxes under Section 4945 on "taxable expenditures", including expenditures to influence legislation. The lobbying of a private foundation is subject to a tax equal to 100 percent of lobbying expenditures if such expenditures are not "corrected" within a specified period, along with further excise taxes where lobbying expenditures are repeated. Foundation managers who agree to the making of expenditures to influence legislation may also be subject to individual excise taxes. The excise taxes imposed upon private foundations and their managers with respect

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[29] S. Rep. No. 552, 91st Cong., 1st Sess. 47 (1969), *reprinted in* [1969] U.S. Code Cong. & Ad. News 2027, 2074-2075; H. Rep. No. 413 (Part 1), 91st Cong., 1st Sess. 32 (1969), *reprinted in* [1969] U.S. Code Cong. & Ad. News 1645, 1676-1677.

[30] Under Section 509, the term "private foundation" is defined to include any organization that qualifies for exempt status under Section 501(c)(3), unless the organization can demonstrate the requisite degree of public support and public involvement.

to attempts to influence legislation have the practical effect of a prohibition on foundation lobbying.[31]

This concern, then, with private-purpose lobbying was the basis both for the 1934 legislation adding a lobbying limit to what are now Sections 170(c)(2) and 501(c)(3), and for the 1969 legislation that subjected the new category of private foundations to a virtual lobbying prohibition. Although the private foundation provisions effectively put an end to the worst cases of tax-subsidized lobbying by privately-controlled groups, enactment of the 1969 legislation did not end the concern of the Congress with the tax treatment of charities, or with the specific issue of lobbying.[32] Particular criticism was directed at the vagueness of the "substantial part" test of Section 501(c)(3),[33] which in some cases was said to have such a chilling effect that charities avoided lobbying entirely. Proposals for change focused upon ways to reduce the uncertainties of application inherent in the formulation of the Section 501(c)(3) lobbying limit and to increase

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[31] It has been suggested that "private foundations are the only class of institutions in the United States which the Federal Government attempts directly and entirely to prevent from stating views on legislative issues". Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 NYU Inst. on Fed. Tax. 1415, 1464-65 (1973).

[32] *See, e.g.*, Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972); General Tax Reform: Hearings on the Subject of General Tax Reform Before the House Comm. on Ways and Means, 93d Cong., 1st Sess., Parts 4, 15 (1973); Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means, 94th Cong., 2d Sess. (1976). During this period, numerous bills were introduced relating to the lobbying activities of charities.

[33] *See, e.g.*, Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Committee on Ways and Means, 92d Cong. 2d Sess. 32-33 (1972) (statement of Mortimer M. Caplin).

the actual lobbying allowance for public charities.[34] There was, however, even after the 1969 amendments, a perceived need to maintain some restrictions on the ability of public charities to serve as vehicles for the deduction of lobbying expenditures.[35]

Congress responded to these concerns in 1976 with legislation designed to accommodate the need of public charities for specificity and certainty, while maintaining a meaningful but measured limitation on the use of tax-subsidized funds for lobbying. Under the new Section 501(h),[36] organizations described in Section 501(c)(3) can elect to have their lobbying expenditures subjected to precise quantitative limitations, set by reference to overall expenditures. For organizations that exceed their limits, the result is not loss of exemption but a tax on excess lobbying expenditures. The Section 501(h) election allows large publicly-supported charities to do quite extensive lobbying, while smaller charities can do less, and can only lobby if they are prepared to undertake a substantial program of other charitable activities.

Appellee may argue that in working out this statutory scheme Congress incorrectly balanced the interests at stake, but it surely cannot maintain that Congress acted

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[34] Geske, Direct Lobbying Activities of Public Charities, 26 *Tax Law.* 305 (1972).

[35] Under the provisions of Section 509(a), an organization can avoid classification as a private foundation if it derives more than one-third of its support over a four-year period from permitted public sources. After 1969, therefore, an organization could continue to derive a majority of its support from a few individuals, without becoming subject to the private foundation lobbying limitations.

[36] Section 501(h) and its companion Section 4911 were added to the Internal Revenue Code by section 1307 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720 (1976).

inadvertently.[37] Nor can it argue that Congress was without basis in drawing distinctions between the lobbying of charities and that of veterans' organizations. The element of private control and the potential for use of exempt organizations to generate deductions for private-purpose lobbying is simply lacking in the context of veterans' groups. Just as Congress could reasonably determine that public charities are less subject to lobbying abuses than private foundations and that significantly different lobbying limits should accordingly be applied, so it could determine that by their very nature veterans' groups are less susceptible to private control than public charities, and that accordingly no specific lobbying restriction is necessary.

Both the membership and the organizational structure of veterans' organizations assure that only broad public interests are represented, and that there is a true consensus within a large public body before any legislative positions are advocated. The VFW, for example, has a membership of approximately 1,900,000, cutting across lines of race, politics, geography, and wealth. Its purposes are set forth in a federal charter and its institutional programs are adopted at a national convention, the proceedings of which are required by statute to be reported to Congress. 36 U.S.C. § 118 (1976). Legislative positions of the VFW are adopted pursuant to an elaborate administrative framework, which functions to filter out proposals or issues that are of concern to less than a majority of the membership, or that are not consistent with the VFW's charter objectives. This institutional control over legislative activities does in fact operate to limit the VFW's lobbying to issues that are well within its charter mandate.

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[37] Appellee itself has declined to make an election under Section 501(h). J.S. App. at 105a. By its own refusal to accept the form of legislative relief that Congress has fashioned, however, appellee cannot diminish the significance of Congress' deliberative process, or subject Congress' determination to judicial legislating.

During the two-year period beginning on June 17, 1980, the VFW authorized 83 appearances before Congressional committees, 76 (92 percent) of which were at the invitation of the committee and *all* of which were related to veterans' affairs.[38]

Because such an overwhelming percentage of the VFW's legislative appearances are by invitation of the Congress, it is particularly ironic for the Court of Appeals to contemplate a judicial limitation on veterans' lobbying as a remedy for a Congressionally-created statutory distinction. Veterans' organizations perform an essential intermediary role in the relationship between veterans and the federal government. The VFW represents veterans before the Veterans Administration and before military boards, and occupies government office space for that purpose. Through its myriad state and local units the VFW is in constant touch with veterans throughout the nation. In view of this extensive continuing contact between the VFW and veterans, and the

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[38] Apparently because of the insufficiency of the record below, the Court of Appeals made several assertions with respect to the lobbying efforts of the VFW that are incorrect or misleading. The court, for example, cited as an instance of lobbying outside the scope of veterans' concerns certain appearances by the VFW in connection with the proposed Panama Canal treaties. In fact, the VFW was *invited* to appear before the Senate Committee on Foreign Relations in regard to the proposed treaties. *See Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 566 (1977) (statement of Col. Phelps Jones), *cited in* J.S. App. at 72a, n.49. Consequently, the VFW asked to testify at the House Committee hearing on the same subject. The VFW's testimony was given under the authority of a resolution unanimously adopted at its national convention. *See Proc. of the 78th Nat. Convention of the Veterans of Foreign Wars of the United States*, H.R. Doc. No. 292, 95th Cong., 2d Sess. 25, 66 (1978). Concern with matters of national security such as the Panama Canal is well within the VFW's charter mandate "to maintain and extend the institutions of American Freedom, and to preserve and defend the United States from all her enemies, whomsoever." 36 U.S.C. § 113 (1976).

complexity and number of veterans' programs, Congress expects and requests the VFW to advise it on all matters relating to veterans' affairs.[39]

Since the Congress receives annual reports from the VFW and since it initiates most of the VFW's legislative appearances, it is certainly well aware, as it has been since 1934, of the extent and nature of VFW lobbying. Had there been a concern with abuses of veterans' lobbying comparable to the concern with lobbying by private foundations and public charities, Congress had the perfect opportunity to address the issue. In 1972, a few years after enactment of the private foundation lobbying restrictions and in the midst of the review that led to the enactment of Section 501(h), Congress reconsidered and substantially revised the statutory provisions governing the taxation of veterans' organizations. The Act of August 29, 1972[40] added to the Internal Revenue Code Section 501(c)(19), which functions specifically to exempt from tax the income of qualified veterans' groups, and Section 512(a)(4), which provides a special exception from the unrelated business income tax for income derived by Section 501(c)(19) organizations from providing insurance benefits for members and dependents. The Senate Finance Committee noted that Section 512(a)(4) excludes insurance income from the unrelated business income tax only to the extent that such income is set aside "for the purpose of either providing for the payment of insurance benefits or for religious, charitable, scientific, literary, educational, etc. purposes", and added

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[39] It might be noted that a very substantial portion of the VFW's lobbying costs, which are incurred in testifying before the Congress at the request of the committees, would appear not to constitute "lobbying expenditures" under the Internal Revenue Code. *See* Sections 4911(d)(2)(B) and 501(h).

[40] Pub. L. No. 92-418 § 2, 92d Cong. 2d Sess., 86 Stat. 656.

that "the committee does not intend for any expenditures for lobbying purposes to come under this exemption."[41]

Although the practical effect of the Finance Committee's comment could be questioned,[42] it demonstrates unequivocally that in the course of reconsidering the exempt status of veterans' groups, Congress gave specific consideration to the tax consequences of veterans' lobbying. This was the natural occasion for imposing any limits or conditions on lobbying that might be deemed necessary, yet it produced only the Finance Committee's very measured response. The exemption and unrelated business income tax provisions of the Act of August 29, 1972, coming roughly in the middle of a decade of intensive legislative consideration of exempt organization lobbying, effectively dispel any notion that Congressional action in this area was other than quite deliberate and conscious. Such deliberate legislative distinctions drawn in response to perceived differences among classes of tax-exempt organizations must be sustained against an equal protection challenge.

The tax code's special classification of veterans' groups draws additional constitutional support from the repeated judicial approval of legislation designed specifically to aid veterans. Legislative preference for veterans dates back to colonial times.[43] Veterans' preferences reflect the sense of the Congress that "those who are selected from among us to wear the uniform and to serve the country on the firing line are certainly entitled, when peace has been won through their efforts, to be

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[41] S. Rep. No. 1082, 92d Cong. 2d Sess. 5 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3141, 3145.

[42] Troyer, *supra*, n.31 at 1415, 1422-1425.

[43] Staff of House Comm. on Veterans' Affairs, 84th Cong., 1st Sess., The Provision of Federal Benefits for Veterans: An Historical Analysis of Major Veterans' Legislation, 1862-1954 (Comm. Print 171, 1955).

selected and given special consideration and preference in employment by their Government in peacetimes."[44] Under present law veterans are eligible not only for significant preferences in both federal and state government employment, but for special life insurance, 38 C.F.R. §§ 6.2, 8, 9.3; special loans, *id.* §§ 11.75-76; special medical and health care services, *id.* §§ 17.35; special assistance in vocational rehabilitation and educational pursuits, including allowances during periods of training, *id.* § 21.40-43; and special loan guarantees for purchases of homes and land, *id.* § 36.4203.

Veterans' preferences have been upheld in a long line of cases involving constitutional issues, including equal protection.[45] This Court recently upheld against an equal protection challenge a Massachusetts statute that gives veterans a permanent and absolute civil service employment preference. *Massachusetts v. Feeney*, 442 U.S. 256 (1979). The critical constitutional issue that the Court faced in that case was whether the distinction drawn between veterans and non-veterans was a pretext for gender-based discrimination. *Id.* at 274-85. Implicit in such an analysis was the assumption that a veterans' preference *per se*, and even such a substantial one, would plainly be constitutional. If the legislature is justified in extending preferred status to veterans, then it is surely justified in imposing restrictions on other groups, such as those found in the tax code, that only indirectly inure to the benefit of veterans.[46]

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[44] *Id.* at 261.

[45] *See, e.g.*, White v. Gates, 253 F.2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); Frederick v. U.S., 507 F.2d 1264 (Ct. Cl. 1974). *See also* J.S. App. at 114a; J.S. at 19.

[46] Contrary to the assertion made by appellee and adopted by the Court of Appeals, this case does not involve the use of "First Amendment rights" as a form of "currency" to reward veterans. Taxation With Representation of Washington v. Regan, 676 F.2d

CONCLUSION

The *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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715, 740 (D.C. Cir. 1982), *appeal docketed* 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338). As the development of the exempt organization provisions demonstrates, *supra* 18-27, the lobbying provisions reflect Congressional concern with problems that are not present in the case of veterans' groups, rather than an effort to "favor one speaker over another," *Id.*